

July 8, 2003

Gene Merriam, Commissioner
Minnesota Dept. of Natural Resources
500 Lafayette Road
St. Paul, MN 55155

Re: In the Matter of the Appeal of the Trespass Citation Issued to
Robert M. Soule
Citation No. 42492
OAH No. 3-2000-15421-2

Dear Commissioner Merriam:

On June 18, 2003, a prehearing conference was held in this matter by telephone. Robert M. Soule and Conservation Officer Dave Rodahl participated. During the prehearing conference, the parties agreed to submit the matter to me for decision without further hearing in order to resolve the matter, and they each affirmed that the facts as stated to me were true. The material facts are not disputed. They are as follows:

On May 1, 2003, at approximately 5:30 a.m., Robert Soule and a friend entered private land that was properly posted in order to dip net fish in a creek that runs through the property. Mr. Soule and his friend have, for several years, entered this property on May 1 of each year in order to dip net rough fish on the first day of the open season.^[1]

Mr. and Mrs. Wayne Kutter own the property. Each year for the past several years, before the season for rough fish opens, the Kutters have allowed persons licensed to take sucker eggs^[2] to enter their land. Over the years, Mr. Soule has encountered and spoken to the licensees at the creek. He assumed that they were the property owners and that they did not object to him being there. According to Mr. Soule, they never claimed to be the property owners, nor did he ever ask them if they were, but "they never said they were not." Three or four days before this incident, he saw them on the road near the creek, and they told him that "We'll be done by May 1, then you can have at her."

On the day in question, Officer Rodahl was on the property to determine whether the egg harvest had been completed. He saw Mr. Soule fishing and explained that Mr. Soule was trespassing on private land that was properly posted. Officer Rodahl issued

an administrative citation to Mr. Soule, but not to his friend. Officer Rodahl walked off the property with them, pointing out the posted signs.

As Mr. Soule reached the road, a car driven by some acquaintances pulled up. Mr. Soule explained to them what had happened. The acquaintances informed him that the Kutters owned the land, that they had just been to the Kutters' home themselves to obtain permission, and that Mr. Soule should do the same. They told him where the Kutters' home was located. Mr. Soule drove to the Kutters' home, spoke to them, and obtained permission to cross their land. He and his friend returned to the creek and fished without further incident, along with many others who had received permission to fish that day.

According to Officer Rodahl, the Kutters freely give permission to cross their land but insist that people ask before entering the property. He says they have clearly communicated to the DNR their desire that trespassers not be charged with gross misdemeanor trespass charges, but they do wish to have the trespass laws enforced. Mr. Soule maintains that he has spoken to the Kutters recently and that they do not want him to receive an administrative citation either. The Administrative Law Judge has assumed that this representation is true.

The trespass statute provides in relevant part that "a person may not enter, for outdoor recreation purposes, any land that is posted under this subdivision without **first** obtaining permission of the owner, occupant, or lessee."^[3]

Mr. Soule acknowledges that he did not obtain permission from the Kutters before entering their land. He believes, based on his history of fishing there, the "implied" permission from the licensed egg harvesters, and the post-citation permission given by the Kutters, that he was there with permission and should not have been cited.

Mr. Soule's history of fishing on the property one day per year does not provide any legitimate basis for concluding that he had permission from the owners or that the owners somehow waived their right to enforcement of the trespass law. The land is properly posted, and the evidence that Mr. Soule's acquaintances knew to seek permission from the Kutters supports Officer Rodahl's testimony that the Kutters want to know beforehand who is entering their property. Nor is there a sufficient basis for his belief that he had permission from others, who were not the property owners. Mr. Soule did not ask whether they owned the property, and they did not represent that they were the owners. The fact that others were there with permission does not relieve Mr. Soule of his obligation to contact the owner and obtain permission himself. Finally, the permission given by the Kutters after the citation was issued does not invalidate the citation, nor is their desire to help him avoid a financial penalty determinative. The fact is that when Officer Rodahl issued the citation, Mr. Soule was on posted land without the prior permission of the landowner. Accordingly, I must recommend that the citation and \$50 penalty be affirmed.

IT IS HEREBY RECOMMENDED that the Department of Natural Resources affirm the administrative citation and penalty. Pursuant to Minn. Stat. § 116.072, subd. 6(e), the commissioner may not issue a final order until at least five days after receipt of the report of the administrative law judge. Mr. Soule may, within those five days, comment to the commissioner, and the commissioner must consider the comments. Once the commissioner has made a final decision, a copy of that decision must be served upon Mr. Soule and the Administrative Law Judge. The final order of the commissioner may be appealed.^[4] If the Commissioner fails to issue a final decision within 90 days of the close of the record, this report will constitute the final agency decision under Minn. Stat. § 14.62, subd. 2. The record closes upon the filing of exceptions to the report, or upon the expiration of the deadline for doing so. The Commissioner must notify the parties and the Administrative Law Judge of the date on which the record closes.

I am closing our file in this matter and returning the record to you.

Sincerely,

/s/ Kathleen D. Sheehy

KATHLEEN D. SHEEHY
Administrative Law Judge
612/341-7602

KDS

cc: Robert M. Soule
Officer Dave Rodahl
Patt Watts, DNR

^[1] See Minn. Stat. § 97C.345 (use of dip nets); Minn. R. 6262.0600 (season for rough fish opens May 1).

^[2] See Minn. Stat. § 17.4994.

^[3] Minn. Stat. § 97B.001, subd. 4 (emphasis added).

^[4] See Minn. Stat. §§ 14.63 to 14.69.